

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Enbridge Pipelines (Illinois) L.L.C.	:	
	:	07-0446
Application pursuant to Sections 8-503,	:	
8-509 and 15-401 of the Public Utilities	:	
Act – the Common Carrier by Pipeline	:	
Law to Construct and Operate a	:	
Petroleum Pipeline and when necessary,	:	
To Take Private Property as Provided by	:	
The Law of Eminent Domain.	:	

**REPLY BRIEF OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

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Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission’s (“Commission” or “ICC”) Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the instant proceeding.

I. INTRODUCTION

Staff’s Initial Brief identified and responded to many of the arguments raised in the Initial Briefs filed by Enbridge Pipelines (Illinois) L.L.C. (“Enbridge”, “Petitioner”, or “Company”), various intervenors identified collectively as the “Pliura Intervenors,” and Shelby Coal Holdings, LLC, Fayette Coal Holdings, LLC and Marion Coal Holdings, LLC identified collectively as “Shelby Intervenors.” In this Reply Brief, Staff responds only to the extent that the various Initial Briefs raised arguments which Staff did not adequately address in Staff’s Initial Brief. Staff continues to rely on its positions and arguments set

forth in Staff's Initial Brief those arguments are incorporated and adopted as if fully set forth herein.

II. DISCUSSION – LEGAL ISSUES

A. Public Need

Section 15-401 of the PUA requires, inter alia, a finding that “a public need for the service exists” (220 ILCS 5/15-401(b)) in order for a certificate of good standing to be issued. The requirement of a demonstration for “public need for the service” is a separate requirement from the requirement for a demonstration of “public convenience and necessity,” which is also required under Section 15-401(b). (See Lakehead Pipeline Company, Limited Partnership, Petitioner-Appellant, v. Illinois Commerce Commission (“Lakehead”), 296 Ill. App.3d 942, 954, 696 N.E.2d 345, 353 (3rd Dist. 1998))

In the context of public need, it is appropriate to look at the larger group of the general public to see if it requires the service, not whether some components of the public are in fact using the service. Only by looking to the public at large can one determine whether there is an actual existing or expected popular need for the proposed service which should not be denied. (*Id.*, p. 955, 354)

The Commission has found that the public need required is that of public and not of any individual or number of individuals; the public is greater than a limited number of market players. (Final Order, p. 34, Docket No. 96-0145, May 7, 1997, 1997 Ill. PUC Lexis 155, citing Roy v. Illinois Commerce Commission, 322 Ill. 452, 458 (1926))¹

When considering the need for the project, the Commission should not limit its

¹ In this contested proceeding, the Commission should follow the reasoning set forth in Lakehead. Although Enbridge relies upon two recent dockets (Docket No. 06-0458 “Keystone” and Docket No. 06-0470 “Enbridge”), neither of those dockets were contested proceedings. As such, Staff concurs with the Commission's finding: “An uncontested case should not be considered as precedence to judge the instant proceeding.” (*Id.*)

considerations to local needs. The consideration of public need “serves to protect and restrict the exercise of such powers as eminent domain.” (Lakehead, p. 952, 352) A local public need would be one method of proving need, but need may also be demonstrated on an interstate basis. (*Id.*)

Enbridge provided economic benefit analyses that support a finding of public need for the pipeline. (See Enbridge Exs. 3.0, pp. 4-21, 3.0A, pp. 4-11, 19-21, 23-40, 47-64, and 71-74) Concerns such as reliability and access to secure supplies have taken on greater meaning since 1996. At that time, we had not experienced \$4 gasoline prices, the impact on petroleum prices resulting from Gulf Coast hurricanes, the attacks of September 11 and the resulting wars in the Middle East, the recent growth of China and other developing countries that demand more oil - just to name a few of the recent world events relevant to this project. (*Id.*) The current docket must be viewed in the context of today’s environment rather than an environment more than a decade ago.

The changing landscape requires us as a nation to re-evaluate our energy supply and transmission network and make sure that it is as reliable and redundant as possible. While one lone pipeline will not prevent supply disruptions from occurring, it does help form a robust national pipeline network to minimize disruptions. Improvements to this network cannot happen overnight and often require years of planning and construction. Additionally, infrastructure such as pipelines must sometimes be put in place first before further downstream improvements will be funded, such as refinery upgrades. As the record shows, several refineries are contemplating future expansion. (Enbridge IB, p. 10) However, those plans may be postponed if this pipeline is not constructed.

B. Fit Willing and Able

The Intervenors have also pointed to Enbridge's recent environmental violations in Wisconsin as proof that Enbridge will violate similar environmental regulations here in Illinois. (Pliura Intervenors IB, p. 22) Staff is always troubled to hear of violations related to the construction or operation of a pipeline, particularly those pertaining to the environment. Staff does not take these issues lightly. However, the State of Wisconsin has settled its dispute with Enbridge, and Enbridge has recently constructed a large portion of the pipeline authorized in Docket No. 06-0470 here in Illinois. Staff is not aware of any further violations in Wisconsin, nor is it aware of any violations in Illinois, and nothing in the record would suggest otherwise. The argument that the "actions of Enbridge Energy, Limited Partnership cannot be imputed to Enbridge Illinois" (Enbridge IB, p. 25) is unpersuasive. More to the point is Enbridge's following statement: "[w]hat this episode does establish is that when accidents and mistakes happen, Enbridge deals with, corrects, and takes responsibility for such matters." (*Id.*) The incidents in Wisconsin, while important, do not warrant the denial of this application when Enbridge has thus far shown that it can construct a pipeline in Illinois and abide by the rules.

C. Properly Filed Application

The Pliura Intervenors allege that Enbridge did not properly file its petition because the Federal Energy Regulatory Commission ("FERC") has not approved Enbridge's tariff for the proposed pipeline. (Pliura Intervenors IB, p. 5) Staff offers no opinion on the FERC certification; it is a matter outside of the Commission's jurisdiction. The argument that in the absence of approved tariffs Enbridge's petition is improper, confuses the Commission's standards for issuance of a certificate authorizing

operations as a common carrier with other requirements. A pipeline does not need to meet the requirements of Subsection 15-401(c) as a prerequisite to receiving a certificate of public convenience and necessity. (See Section 15-401(b))

Subsection 15-401(b) lists all of the requirements for issuance of a certificate and does not mention tariffs or rates. Section 15-401(c), to which Pliura cites, pertains to the duties and obligations of a common carrier. In Staff's view, the duties and obligation apply to the provision of service after the pipeline has received certification. There is no danger of Enbridge providing service at an unfair price because it can only provide such service after the FERC has approved a tariff with reasonable rates and without discrimination. Enbridge has properly filed its application and is not required to demonstrate that it currently has FERC approval.

The Pliura Intervenor contend that the proposed Enbridge pipeline does not qualify as a common carrier because it is not "designed or intended for Illinois producers or the Illinois public" and thus, does not "meet the definition of a common carrier by pipeline." (Pliura Intervenor IB, p. 25) Staff is not sure what definition the Pliura Intervenor are citing, but it is not the Section 15-201 definition:

Sec. 15-201. Definitions. In this Law:

"Common carrier by pipeline" means (1) a person or corporation that owns, controls, operates, or manages, within this State, directly or indirectly, equipment, facilities, or other property, or a franchise, permit, license, or right, used or to be used in connection with the conveyance of gas or any liquid other than water for the general public in common carriage by pipeline...

Staff sees no requirement that "Illinois producers or the Illinois public" must have access to the pipeline. Instead, the law says that the general public must be served by the pipeline, a condition that this pipeline will meet. As Staff has discussed before, the

general public has a broad scope that reaches beyond the borders of Illinois. Nevertheless, Staff believes that Illinois citizens will benefit from the pipeline, and Illinois refineries and other businesses and interests will indeed have the opportunity to ship products on this pipeline if they so desire.

D. Public Convenience and Necessity

As with the inquiry as to “public need,” convenience and necessity should be considered in the context of the public and not based upon the individuals or a number of individuals. (See *supra*, p. 2-4)

The Pliura Intervenors imply that since Enbridge is going to make money from the proposed pipeline, it cannot serve the public interest. Staff disagrees. A project can meet the needs of both the investing company and the public when their interests intersect. That is what is occurring here – Enbridge will earn a return on oil shipped through its pipeline and the public will receive a benefit from this oil when it purchases gasoline or other refined products. In short, the fact that Enbridge intends to make money from shipping and delivering product has no bearing on whether or not Enbridge met the Commission requirements for a certificate in good standing or if it should be allowed eminent domain authority to construct its facility.

The Pliura Intervenors mischaracterized the testimony of Enbridge witness Cicchetti when they claimed he admitted that there would be no cost savings for Illinois consumers if the proposed pipeline were constructed. (Pliura Intervenors IB, p. 12) In actuality, Dr. Cicchetti stated that he was not sure that prices would be lower in the future, simply because the world market may be trending upward. But the price increases would be smaller with the new pipeline than they would be without the

pipeline, hence there would be a cost savings to consumers. (Tr. p. 589) By adding more spare capacity and lower cost oil to the region, the proposed pipeline would potentially have the effect of lowering regional prices or mitigating regional price increases. The proposed pipeline has the potential to help mitigate price increases in the region for gasoline and other refined products. (See Enbridge IB, p. 12)

E. Eminent Domain

Although Enbridge argues that any implication that it is seeking ICC certification solely to obtain eminent domain authority is “disingenuous” (Enbridge IB, p. 28), Staff is aware of no other reason for Enbridge’s request for a Certificate. Common carriers are only required to seek a Commission certificate when they are engaged in intrastate commerce; the Southern Access Extension pipeline will be used only for interstate commerce. (Staff Ex. 1.0R, p. 19) Enbridge does not need a certificate to construct the pipeline. Enbridge did construct the Lakehead Pipeline, after a certificate and eminent domain authority was denied by the Commission. Other pipelines have recently constructed in Illinois without a certificate or eminent domain authority. To construct the pipeline without a certificate, or eminent domain, the company would simply negotiate with landowners and pay them for the easement. (*Id.*, p. 20)

Staff’s request that Enbridge seek eminent domain simultaneous with its request for relief under Sections 15-401(b) and 8-503 should not be interpreted as support or encourage for the use of eminent domain. Rather in Staff’s view, requests for eminent domain should accompany requests for Certificates (Section 15-401(b)) and for authority or direction to make additions or extensions under Section 8-503 in order that landowners be given every opportunity to participate when eminent domain authority

may be granted as a result of the proceeding. These proceedings may impact the property rights of persons who are not familiar with Commission procedures, making clarity of purpose imperative. In Staff's view, landowners, who do not typically participate in Commission proceedings, should be fully advised of the issues at stake and given the opportunity to participate in the process. Landowners are a valuable source of information regarding the line route itself and are in a unique position to be aware of not only their land, but the surrounding area and may be able to provide information necessary to have a full and complete record. If Section 8-509 eminent domain authority were allowed to be addressed in a standalone proceeding, landowner participation would be less meaningful because issues regarding route, design, construction schedule, and need would have already been resolved in the Certificate and Section 8-503 proceedings. For these reasons, Staff has consistently taken the position that the participation of landowners should be encouraged and facilitated. (See Staff Briefs in Docket Nos. 06-0706, 07-0532, 08-0291/08-0449 Cons.)

As discussed above, the public need requirement protects and restricts the exercise of eminent domain. This "regulates the traditional state power of eminent domain by ensuring freedom from unnecessary and nonorderly intrusion upon private property." (Lakehead, p. 952, 352) Staff has stated that Enbridge has met the necessary criteria for eminent domain. However, Staff has also testified that its preference would be to not grant eminent domain, and that the project could likely be built without it. (ICC Staff Ex. 3.0, p. 24)

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Staff of the Illinois Commerce

Commission respectfully requests that the Commission consider Staff's recommendations and, to the extent, the Commission issues a Certificate in Good Standing to Enbridge includes a description of the pipeline route which is being authorized in its Order in this matter.

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Respectfully submitted,



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